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In The
Supreme Court of the United States

RAYMOND J. LUCIA, *ET AL.*,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICUS CURIAE BRIEF OF ANTHONY MICHAEL SABINO IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. DENYING REVIEW WILL AVOID BOTH THE CONSTITUTIONAL QUESTION AND THE SYSTEMIC RISK FOR ALJs ACROSS A WIDE RANGE OF ADMINISTRATIVE BODIES 2

II. DENYING REVIEW IS APPROPRIATE GIVEN THAT THE MAJORITY OF CIRCUITS TO HAVE ADDRESSED SIMILAR CONTROVERSIES HAVE LIMITED THEIR RULINGS TO JURISDICTIONAL GROUNDS, AND HAVE YET TO OPINE UPON THE CONSTITUTIONAL QUESTION PRESENTED 6

III. THE LOWER COURTS HAVE DISTINGUISHED *FREE ENTERPRISE FUND* FROM THE CONTROVERSY AT HAND, AND THEREFORE REVIEW NEED NOT BE GRANTED ON THAT ACCOUNT 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2016) 4, 5, 11, 12

Bebo v. SEC, 799 F.3d 765 (7th Cir. 2015), *cert. denied*, ___ U.S. ___, 136 S. Ct. 1500 (2016) 8

Bennett v. SEC, 844 F.3d 174 (4th Cir. 2016) 8, 10, 13

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 4

Dep't of Transportation v. Association of American Railroads, 575 U.S. ___, 135 S. Ct. 1225 (2015) 12

Elgin v. Dep't of Treasury, 567 U.S. 1 (2012) 9

Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010) 5, 7, 12

Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991) 12

Hill v. SEC, 825 F.3d 1236 (11th Cir. 2016) 8

Jarkesy v. SEC, 803 F.3d 9 (D.C. Cir. 2015) 8, 9

PHH Corp. v. Consumer Financial Protection Bureau, 839 F.3d 1 (D.C. Cir. 2016), *rehearing **en banc** granted, order vacated*, ___ F.3d ___ (February 16, 2017) 13

Thunder Basin Coal Co. v. Reich, 501 U.S. 200 (1994) 8, 9, 10

Tilton v. SEC, 824 F.3d 276 (2d Cir. 2016), *cert. denied*, ___ U.S. ___, 137 S. Ct. 29 (2016) 7, 8

TABLE OF AUTHORITIES – Continued

Page

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) 2, 3, 4

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. II 1, 2, 7, 12

U.S. Const. Art. II, § 2, cl. 2 7

STATUTE

15 U.S.C. § 78(y)(1) 10

RULE

Sup. Ct. R. 37.2(a) 1

OTHER AUTHORITY

Michael A. Sabino & Anthony Michael Sabino, "Challenging the Power of SEC ALJs: A Constitutional Crisis or a More Nuanced Approach?" 43 *Securities Regulation Law Journal* 369 (2015) 7, 8

INTEREST OF *AMICUS CURIAE*

This *amicus curiae* is a law professor with expertise in constitutional law, securities regulation, and securities litigation. Furthermore, this *amicus curiae* has represented parties in proceedings before the Securities and Exchange Commission (the "SEC" or the "Commission"), and regularly lectures on the precise topics found in the instant Petition. This case implicates, *inter alia*, the Appointments Clause of Article II of the Constitution, judicial review of administrative agency action, and the proper conduct of enforcement proceedings before the SEC. This *amicus curiae* has a professional and scholarly interest in the proper application and development of the law in these domains.[1]

STATEMENT

This *amicus curiae* respectfully adopts, in relevant part, the Statement of Facts set forth in the Petition for Certiorari filed by the Petitioners herein, Raymond J. Lucia, *et al.* (hereinafter, "Petitioners").

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief, as required by Supreme Court Rule 37.2(a). Petitioners and Respondent consented to this filing.

SUMMARY OF ARGUMENT

Denying review herein shall avoid an Appointments Clause question pertaining to the present mode of appointing SEC Administrative Law Judges ("ALJs"), avoid systemic risk to ALJs now adjudicating matters at a wide range of administrative agencies, propagate the appropriate judicial restraint heretofore exercised by a significant number of circuit courts which have avoided the constitutional question herein by resolving substantially similar controversies upon jurisdictional grounds, recognize that these same tribunals have yet to address said constitutional question, and avoid needlessly revisiting existing precedent regulating the proper functioning of the Appointments Clause.

ARGUMENT

I. DENYING REVIEW WILL AVOID BOTH THE CONSTITUTIONAL QUESTION AND THE SYSTEMIC RISK FOR ALJs ACROSS A WIDE RANGE OF ADMINISTRATIVE BODIES.

It is axiomatic that the courts should avoid resolving constitutional questions whenever possible. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [the Court] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 14 (1993) (Blackmun, J., dissenting) (quotation

and citation omitted). This "fundamental rule of judicial restraint" enjoys the sanction of "time and experience." *Id.* (Blackmun, J., dissenting) (quotation and citation omitted). It serves an essential need to protect both "the law and the adjudicatory process." *Id.* at 16 (Blackmun, J., dissenting).

That "fundamental rule of judicial restraint" has been respected in full by a significant number of the appellate courts adjudicating matters substantially similar to the case at bar. In those controversies, as in the instant case, the authority of SEC ALJs to hold office and preside over Commission enforcement proceedings was called into question. Choosing to resolve the cases before them upon jurisdictional grounds, the relevant tribunals wisely avoided a potential constitutional quagmire. *See* Point II, *infra*. While not yet constituting a strict numerical majority of all the circuits, these panel decisions evince a consensus of reasoning eminently rational and reasonable in light of the constitutional precept noted above.

Furthermore, these circuit courts were not merely being adroit. Each of these panels was faithful to the overarching imperative of avoiding a constitutional question wherever possible. Denying review here would not only appropriately resolve the case at bar, it would bestow an imprimatur upon the circumspection exercised by the relevant tribunals which have confronted substantially similar controversies. *Id.*

In sum, the courts do not decide constitutional questions "needlessly." *Zobrest*, *supra*, 509 U.S. at 16 (Blackmun, J., dissenting). Denying review of the case at bar shall properly honor that precept of judicial restraint.

An additional point merits attention at this juncture. SEC ALJs oversee proceedings pertaining to the enforcement of the federal securities acts. For some eight decades, those statutory regimes have assured disclosure, transparency, and honesty in our vital capital markets. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170-71 (1994). The Commission's administrative adjudicators play a key role in accomplishing those objectives. Judicial restraint should therefore be exercised before upending their authority within that regulatory scheme.

The immediately preceding observation regarding SEC ALJs is highly relevant to a more global concern. If review of the case at bar is granted, SEC ALJs would not be the only denizens of the administrative state that would be put in harm's way.

Consideration of the constitutional question advanced herein will undoubtedly have repercussions for *all* ALJs at *all* administrative agencies. This is no small matter, as the following amply demonstrates.

There are reportedly a total of 1,792 administrative law judges in service to federal agencies today, and 1,537 Social Security Administration ALJs alone "collectively handle hundreds of thousands of hearings a year." *Bandimere v. SEC*, 844 F.3d 1168, 1199 and 1199

n.5 and n. 6 (10th Cir. 2016) (McKay, J., dissenting) (citations omitted). Such facts are already well known to the Court. *See Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 586 app. C (2010) (Breyer, J., dissenting) (noting in excess of 1,500 ALJs in the employ of the federal government at that time). It is common knowledge that these agencies and their in-house adjudicators act upon matters of grave importance to ordinary Americans and the latter's everyday lives. *See Bandimere*, *supra*, 844 F.3d at 1201 (McKay, J., dissenting).

Granting review herein brings the potential for chaos. It might very well unleash an untold number of challenges against ALJs across a broad spectrum of agencies, and endanger the everyday administrative adjudications alluded to above. If review of the case at bar is granted, "all federal ALJs are at risk," with the further possibility of "effectively render[ing] invalid thousands of administrative actions." *Bandimere*, *supra*, 844 F.3d at 1199 (McKay, J., dissenting). Such systemic risk cannot be justified in the present circumstances.

In sharp contrast, denying review here would avoid such perils. As point in fact, the significant circuit consensus which has declined to address the constitutional question, *see* Point II, *infra*, has effectively preserved the *status quo* for SEC ALJs specifically and administrative law judges in general. Propagating such judicial restraint will avoid not only the constitutional question, but the potential for harm on a much vaster scale than the case at bar contemplates.

In sum, granting review of the instant case would not only impact SEC ALJs and the agency they toil for, but imperil nearly 2,000 adjudicators at a diversity of administrative agencies. Avoiding the *gravitas* of the constitutional question presented here shall avoid that systemic risk. Accordingly, review should be denied.

For all the foregoing reasons, it is respectfully suggested that review not be granted.

II. DENYING REVIEW IS APPROPRIATE GIVEN THAT THE MAJORITY OF CIRCUITS TO HAVE ADDRESSED SIMILAR CONTROVERSIES HAVE LIMITED THEIR RULINGS TO JURISDICTIONAL GROUNDS, AND HAVE YET TO OPINE UPON THE CONSTITUTIONAL QUESTION PRESENTED.

It is imperative that the history of the contemporary controversy surrounding the authority of SEC ALJs be considered before deciding whether review should be granted in the case at bar. Certainly, it is beyond peradventure that the circuit court decision below is contradicted by a holding of one of its appellate brethren. Yet there is a deal more to be said concerning the state of relevant appeals court rulings regarding the matter at hand, a great deal more indeed. Therefore, the evolution of the existing conflict must be described in some detail.

In the wake of the Great Recession, remedial legislation "dramatically expanded" the authority of the

SEC to bring enforcement actions before its in-house ALJs. *Tilton v. SEC*, 824 F.3d 276, 278-79 (2d Cir. 2016), *cert. denied*, ___ U.S. ___, 137 S. Ct. 29 (2016). Respondents were thus provoked to vigorously contest the power of the Commission's adjudicators to preside over such controversies. *Id.* at 279. Now acting as plaintiffs, these objects of SEC enforcement cases nearly always invoked the holding of *Free Enterprise Fund*, *supra*, 561 U.S. at 484 and 492, in support of the argument that, identical to the accounting industry oversight board members at the center of that landmark, SEC ALJs likewise hold office in violation of the Appointments Clause of Article II. U.S. Const. Art. II, § 2, cl. 2.

The instant controversy's first iteration resulted in a significant number of conflicting district court decisions, espousing a multitude of disparate approaches to the question. Pertinent to the case at bar, a number of trial judges prioritized the Appointments Clause question. *See generally* Michael A. Sabino & Anthony Michael Sabino, "Challenging the Power of SEC ALJs: A Constitutional Crisis or a More Nuanced Approach?" 43 *Securities Regulation Law Journal* 369 (2015) (analyzing the then-extant cases) (hereinafter "*Challenging SEC ALJs*").

Notwithstanding the initial dissonance, contentiousness between the courts below eventually dissipated, for the most part. As these contests percolated to the appellate level, a significant number of the circuits quickly coalesced around a shared rationale. At the center of their respective analyses was *Thunder*

Basin Coal Co. v. Reich, 501 U.S. 200 (1994), with its express delineation of only the most narrow of opportunities for asserting jurisdiction over administrative agency action, and its concomitant disfavoring of liberal judicial intercession in such proceedings. *See Challenging SEC ALJs*, *supra*, at 372 and 380 (synthesizing the sophisticated *Thunder Basin* analytical triad and its progeny).

Thus, a degree of harmony was restored as a significant number of appellate panels applied the three-pronged test of *Thunder Basin*, and denied relief on the basis of the jurisdictional maxims articulated therein. Moreover, in so constraining their mode of analysis, these tribunals successfully avoided the Appointments Clause question altogether. *Bebo v. SEC*, 799 F.3d 765, 767-68 (7th Cir. 2015), *cert. denied*, ___ U.S. ___, 136 S. Ct. 1500 (2016); *Jarkesy v. SEC*, 803 F.3d 9, 29-30 (D.C. Cir. 2015); *Tilton*, *supra*, 824 F.3d at 279 and 291; *Hill v. SEC*, 825 F.3d 1236, 1237 and 1241 (11th Cir. 2016); *and Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016).

To be sure, each circuit court inscribed its own nuances upon the teachings of *Thunder Basin*. *See Tilton*, *supra*, 824 F.3d at 279 and 282 (apparently giving equal weight to all three jurisdictional factors, and further emphasizing the "closer questions" presented therein on the last two legs of the *Thunder Basin* test); *Hill*, *supra*, 825 F.3d at 1250 (finding the last two requirements of *Thunder Basin* "do not cut strongly either way and thus do not persuade us"); *Bennett*, *supra*, 844 F.3d at 183 and 183 n.7 (while seeming to consider

all three elements of *Thunder Basin*, nevertheless declaring in a parenthetical the first prong of *Thunder Basin* is "the most important"); *Jarkesy*, *supra*, 803 F.3d at 22 (*Thunder Basin* provides "guideposts for a holistic analysis"); *compare Bebo*, *supra*, 799 F.3d at 773 (stressing the importance of *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012), to its jurisdictional analysis). In this manner, nearly half of the courts of appeals gave a wide berth to the constitutional question posed here.

Four salient points emerge from the foregoing.

First, these circuit courts never reached the constitutional question posed in the instant case. Accordingly, we lack the benefit of their present thinking upon that important issue.

Furthermore, without relevant pronouncements from this significant number of appellate courts, we cannot confirm if there truly is an intercircuit conflict in need of resolution. This provides an additional reason for abstaining from review of the question presented, at least until some or all of the tribunals cataloged above promulgate more lucid expressions of their perspectives upon the pending controversy.

Second, each of these august tribunals wisely selected a path far less likely to instigate a constitutional cataclysm. By confining their reasoning to jurisdictional grounds alone, each engaged in a commendable exercise of judicial restraint. This discretion by the courts below strongly favors extending that same circumspection to the case at bar.

Third, the circuit decisions examined hereinabove demonstrate a remarkable cohesiveness amongst themselves. Notwithstanding their individual gloss upon landmarks such as *Thunder Basin*, these panel opinions are strikingly consistent in their respective modes of reasoning, insofar as they are delimited to jurisdictional predicates. This also cuts against the notion that there exists an irredeemable circuit conflict that can only be reconciled by granting review of the instant case.

Fourth, while the tribunals enumerated above have forged a consensus (albeit a rough one), this subgroup nonetheless represents, numerically, less than half of the total number of circuit courts. This fact stands in counterpoise to the securities law proviso which guarantees that any person aggrieved by a decision of the SEC may seek review before the circuit court of appeals where she resides or does business. 15 U.S.C. § 78(y)(1). *See, i.e., Bennett, supra*, 844 F.3d at 177.

It cannot be denied that the statute contemplates, indeed outright invites, a nationwide response from *all* of the appellate courts upon matters such as the question presented here. The geographic dispersion of the circuit decisions noted above testifies, at least in part, to the truth that this statutory prerogative leaves wide open the possibility (one might even say the probability) that additional tribunals shall come to opine on some or all of the same issues found in the case at bar. Put another way, it can be said that the instant controversy is still in a nascent stage, and requires further

growth before being classified as a genuine internecine conflict, divisive enough to merit review.

Certainly, it is beyond argument that there is an irreconcilable conflict between *Bandimere* and the case at bar. *Bandimere*, *supra*, 844 F.3d at 1182 (expressly disagreeing with the holding below in the instant case). *See also* Petition for Certiorari at 19. But can review be justified when the discord is thus far cabined to only two tribunals?

More to the point, that pair of diametrically opposed appellate decisions must be carefully weighted in counterpoise to the larger subset of circuit court rulings set forth above, each one of the latter confined to jurisdictional grounds, and without reference to the constitutional question proffered in the instant case. It is once more respectfully suggested that a true internecine circuit conflict necessitating review presupposes a conflagration far more severe that the one evident here.

In sum, with the constitutional question in the case at bar not yet addressed in the present circumstances by a clear majority of the circuits, with a significant number of tribunals having exercised judicial restraint, to wit, avoiding said question and instead coalescing upon jurisdictional grounds for their *ratio decendi*, with an irrefutable statutory opportunity for more appellate courts to be heard on the question at hand, and with but two circuits in polar opposition regarding these matters, the aggregation of these factors does not favor review.

For these reasons, it is respectfully suggested that review not be granted.

III. THE LOWER COURTS HAVE DISTINGUISHED *FREE ENTERPRISE FUND* FROM THE CONTROVERSY AT HAND, AND THEREFORE REVIEW NEED NOT BE GRANTED ON THAT ACCOUNT.

To preserve our ordered system of liberty from the excesses of executive power, the Framers acted upon a fundamental and inarguable precept. "Liberty requires accountability." *Dep't of Transportation v. Association of American Railroads*, 575 U.S. ___, ___, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring). In recognition of that basic truth, the Framers incorporated several "accountability checkpoints" into the Constitution, *id.*, 575 U.S. at ___, 135 S. Ct. at 1237 (Alito, J., concurring), each one securing separation of powers and checks and balances.

Prominent among them is the Appointments Clause, a "structural safeguard" that tethers federal officers to the "sovereign power of the United States, and thus to the people." *Bandimere, supra*, 844 F.3d at 1188 (Briscoe, J., concurring). Above all else, the Appointments Clause insists that those who wield executive authority remain "accountable to political force and the will of the people." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 884 (1991).

For nearly a decade, *Free Enterprise Fund, supra*, has been the pivot upon which Appointments Clause

controversies have turned. *See, i.e., PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1, 7 (D.C. Cir. 2016), *rehearing* ***en banc*** *granted, order vacated*, ___ F.3d ___ (February 16, 2017) (oral argument for the *en banc* hearing held May 27, 2017). Notwithstanding the eminence of *Free Enterprise Fund* as a guardian of separation of powers and checks and balances, it need not, in truth, be applied to every single instance where the authority of an administrative agency adjudicator is called into question.

At least two of the relevant circuit court decisions set forth hereinabove held that the controversies before them regarding the authority of SEC ALJs were distinguishable on their facts from *Free Enterprise Fund*. *See, i.e., Hill, supra*, 825 F.3d at 1247-48 (the complainant was "not in the type of precarious position the Supreme Court found unacceptable in *Free Enterprise Fund*"); *Bennett, supra*, 844 F.3d at 182 and 186 (distinguishing on the facts, and declaring the plaintiff "reads too much into" and further "misreads" *Free Enterprise Fund*).

Thus, there is no misapprehension of *Free Enterprise Fund* in need of correction here. Quite to the contrary, the abovementioned circuit decisions ably demonstrate that the lower courts are fully capable of either applying or distinguishing *Free Enterprise Fund* on factual grounds, as circumstances necessitate.

Respectfully, review need not be granted on that account.

This *amicus* respectfully suggests that any of the three points hereinabove would constitute sufficient cause to deny review. The presence of all three suggests even more strongly that review should be denied.

CONCLUSION

Respectfully, for all the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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